Board within 45 days or possibly sooner.[4] Thereafter, on September 24, 1965, the IBT filed a motion with the Mediation Board in the form of a telegram asking that the Board not conduct its election until at least 90 days after the date on which the parties received a list of the employee names and addresses from REA Express (R. 142, 208).[5] This motion was based on a claim that if the representation election were held as scheduled, the IBT would be deprived of constitutional and statutory rights and the eligible employees would be deprived of a right to hear the contestants. This motion was followed by a memorandum in which IBT argued that it had a right of free speech guaranteed by the First Amendment to the United States Constitution and an implied right arising from the Railway Labor Act to engage in a full election campaign (R. 93). On October 8, 1965, the Mediation Board denied the IBT motion in the light of the requirements of Section 2, Ninth, of the Railway Labor Act, the Board's established practices thereunder, and the fact that the parties had been on notice since March 24, 1965, of the pendency of the representation dispute (R. 139, 209). On that date, the Mediator advised the parties that the election would be by mail, that the ballots would be mailed out no later than November 4, 1965, to be returned not later than December 1, 1965 (R. 151, 200).

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[4] Through an inadvertent mix-up in designating exhibits to the complaint, Exhibit G showing that the IBT counsel was so informed was not reproduced in the Joint Appendix before the Court of Appeals. Counsel for IBT agreed that this exhibit could be reproduced in the BRC brief to the Court of Appeals and it was so reproduced as Appendix B thereto. It appears as Appendix A to the present brief.

[5] Appendix A to this brief.

On October 15, 1965, copies of the great bulk of an eligibility list compiled by the carrier were furnished to the parties (R. 153, 200). These lists were not furnished for campaign purposes, but to enable the parties to check eligibility and challenge the validity of votes cast when counted (R. 200).[6]

In the meantime, IBT pursued numerous administrative and legal actions to delay or prevent the holding of a representation election, including the present suit filed on October 13, 1965 (R. 1).[7] Paragraph 24 of the complaint alleged eight errors by the Mediation Board in the processing of the BRC representation application (R. 15, 16). Subparagraph (g) set forth the IBT claim that the Mediation Board had denied IBT rights of free speech and association protected under the First Amendment to the Constitution, which is the subject of the present petition (R. 16).

IBT filed a motion with the District Court for a preliminary injunction to stay the representation elec-

[6] The list then furnished included approximately 34,000 names and addresses of the 35,560 employees of REA Express to whom ballots were sent (R. 152, 157, 200). Subsequently, an additional list was provided (R. 153, 200).

[7] These included a petition to the Interstate Commerce Commission, identified as ICC Ex Parte 72 (R. 47), and representation petitions to the National Labor Relations Board by the local unions of IBT seeking NLRB certification to represent the employees of REA Express involved in the dispute before the Mediation Board (R. 13, 89), which were denied (R. 50, 90). In addition, IBT filed a suit in the District Court on September 17, 1965, against BRC to compel withdrawal of the BRC representation application on the grounds that it violated the 1937 mediation agreement between the parties (Civil Action No. 2305-65). On October 4, 1965, the District Court dismissed the complaint and the Court of Appeals affirmed the dismissal on March 22, 1966 (*International Brotherhood of Teamsters* v. *Brotherhood of Railway and Steamship Clerks*, 358 F. 2d 540).

tion, which was denied by that court on October 25, 1965 (R. 144). IBT appealed such order and requested a stay from the Court of Appeals, which was denied on October 29, 1965 (R. 188). On October 30, 1965, IBT applied for a stay to this Court, which application was denied by Chief Justice Warren on that date (R. 188).

On November 1, 1965, the Mediation Board mailed out to eligible employees of REA Express 35,560 ballots (R. 157, 204, 205). 28,320 ballots were returned to the Mediation Board in custody of the United States Postmaster in New York City by December 1, 1965 (R. 201, 204, 205). These ballots were counted by the Mediator and his assistants in the presence of representatives of BRC and IBT between December 3rd and 5th, 1965, and the Mediator certified the following results: (R. 157, 204, 205)

"Number of employees on list of eligible voters	35,560
Number voting for representation by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America	10,192
Number voting for representation by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, AFL-CIO	17,867
Number voting for representation by Other	0
Number of void ballots not allocated to any party	261".

The representatives of BRC and IBT were given full opportunity to challenge the validity of any vote (R. 202). Only 32 ballots were challenged (R. 202).

Although the IBT representative refused to sign the Mediator's certification of results as requested by the Mediator (R. 205), the IBT filed no challenge to the election (R. 206). On December 10, 1965, the Mediation Board certified BRC as the duly designated and authorized representative of the employees of REA Express involved for the purposes of the Railway Labor Act (R. 166, 181-183). Since that date, the BRC has represented the employees of REA Express covered by the certification.

Thereafter, IBT pursued its present action (without amending the complaint to embrace the Mediation Board certification). The Mediation Board and BRC filed similar motions to dismiss the complaint or for summary judgment (R. 109, 110, 207, 208), and IBT filed a cross-motion for summary judgment (R. 145, 146). The District Court granted the motions of the Board and BRC while denying the IBT cross-motion (R. 217).

Before the Court of Appeals, IBT abandoned all of its claims set forth in paragraph 24 of the complaint, except the claim that the Mediation Board's denial of its motion for a stay of the representation election for not less than 90 days after preparation of the eligibility lists violated requirements of the Federal Constitution. In its per curiam opinion affirming the judgment of the District Court (Appendix A of Petition), the Court of Appeals held (1) that, in light of the well established limitations upon judicial review of employee representation proceedings under the Railway

Labor Act, there was a heavy burden upon the IBT to sustain its constitutional challenge, and (2) that the Court could not say on the record before it that the IBT was so severely deprived of campaign opportunities to hold, contrary to the judgment of the Mediation Board, that constitutionally protected rights were infringed.

REASONS FOR DENYING THE PETITION

The petition does not present for the consideration of this Court any important question of Federal law. Nor does the decision below require review because of a conflict with any decision of this Court or of any Court of Appeals. Finally, the decision below is clearly correct.

The petition seeks to raise constitutional issues with respect to the manner in which the National Mediation Board selected an employee representative for employees of REA Express. It clothes the petitioners' disagreement with the Mediation Board's action in constitutional terms in an obvious effort to avoid the impact of the decisions of this Court, which have held that the conduct of representation elections and the choice of employee representatives under the Railway Labor Act have been left by Congress to the final determination of the Mediation Board. *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297 (1943); *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650 (1965). However, the petition does no more than present a disagreement with the judgment of the Mediation Board as to the date upon which a representation election should be held and with the decision of the Court of Appeals that on the

record it could not find that the choice of the Board infringed any constitutional rights. The petition therefore merely raises a question as to the reasonableness of the judgment of the Mediation Board in the situation before that Board with respect to a matter committed by Congress to the Board and the decision of the Court of Appeals not to override that judgment. Such petition does not raise a substantial question of Federal law.

The effort of the petitioners to create a constitutional issue by reference to the decisions in *Staub* v. *City of Baxley,* 355 U.S. 313; *Thomas* v. *Collins,* 323 U.S. 516; and *Thornhill* v. *Alabama,* 310 U.S. 88; is wholly without substance. Those cases involved effort by governmental authority to restrict the free speech of unions or their representatives. In the present case, the Mediation Board did not deny to IBT or anyone else the right to express any views it wished to anyone. It simply scheduled a representation election equally applicable to all concerned and the IBT argument relates solely to the date upon which the election was held. The petitioners' argument is to the effect that the Constitution guaranteed them (1) the right to receive a list of REA Express employees eligible to vote, (2) a period of time thereafter (IBT requested 90 days) to communicate with each such employee by mail or personal visit, and (3) that if it had been granted such privilege the IBT might have persuaded a sufficient number of employees to vote for IBT to reduce the approximate 64% of the vote received by BRC below 50% and to increase the 36% of the vote IBT received to above 50%. This argument involves propositions not heretofore established by any court in the land.

A union has no constitutional right to become a statutory bargaining agent with the privileges attached thereto. This is solely a matter of employee choice pursuant to statute, subject to the conditions which Congress has attached thereto. *McLeod* v. *Local 476, United Brotherhood of Industrial Workers,* 288 F. 2d 198, 201 (2nd Cir., 1961); *Local 1545, United Brotherhood of Carpenters & Joiners* v. *Vincent,* 286 F. 2d 127, 131 (2nd Cir., 1960); *Fay* v. *Douds,* 172 F. 2d 720, 724 (2nd Cir., 1949); *IBT Local 826* v. *Kaynard,* 48 LRRM 2168[8] (D.C. S.D. N.Y., 1961).

Nor do individual employees have any constitutional right to be represented by a union of their choice. *National Maritime Union of America* v. *Herzog,* 78 F. Supp. 148, 154 (D.C. D.C., 1948), aff'd 334 U.S. 854.

It is difficult to perceive how a union, which has no constitutional right to representation under the Railway Labor Act, has a constitutional right to a list of eligible voters and to campaign among those voters. It is equally difficult to perceive how the IBT members, who have no constitutional right to representation or to be represented by a union of their choice, have any constitutional right with respect to the time of an election for such representative.

Moreover, in the *Association for the Benefit of Non-Contract Employees* case, it was argued to this Court that the procedures followed by the Mediation Board in representation elections and the form of ballots used violated constitutional rights both of the carrier and the employees involved (R. 191-196). In rejecting these claims, this Court pointed out that the Railway Labor Act instructs "the Board alone to establish the

[8] Citation reference is to Labor Relations Reference Manual.

rules governing elections" and that, absent a showing that the Board has acted in excess of its statutory authority, there is no basis for judicial review. *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650, 668, 669. Obviously, the Mediation Board acted within its statutory authority in the present case which, in substance, directs the Board to determine representation disputes within 30 days if possible and in any event as promptly as practicable.

Moreover, any claim that the Mediation Board acted unfairly is without substance. The representation election was not held until more than seven months after the filing of the BRC application. During this period, the IBT knew that there would be a representation election and that such election would at the very least embrace most of the employees involved. The suggestion in the petition (footnote 4, page 13) that IBT did not know there would be an election because it had raised serious issues is refuted by reference to the Board's decisions of September 8, 1965. These show that the questions raised by the IBT before the Board were all either matters with respect to which the Board had long established practices or were wholly without merit and obviously were raised solely for purposes of delay.

No different conclusion may be reached even if the period after the Board's determinations of September 8, 1965, is used as a standard of measurement. As a result of those determinations, it was clear that a representation election would be held and the parties knew the group of employees involved. Such election was not held for two months thereafter. The Board did not prevent the IBT from conducting an election

campaign at any time during this period. Many major political campaigns are conducted during such a period of time.

Even if one looks only at the period of time which elapsed after the IBT was informed by the Mediator as to the date on which the election would begin (September 23, 1965), the IBT had approximately six weeks in which to conduct a campaign. Again, this is a substantial period of time.

The IBT argues that it had a much shorter period because it was not furnished a list of the eligible employees until a later date. It contends that it is constitutionally entitled to a list of eligible employees, a period thereafter in which to verify such list for campaign purposes, and a further lengthy period thereafter to campaign by direct contact with each employee either by mail or by home visits. If this argument were sound, it would never be possible for the Board to comply with the 30-day requirement of Section 2, Ninth, no matter how small the craft or class of employees involved. It would also substantially increase the period of time in which representation disputes remain unsettled under the Railway Labor Act. Moreover, while such lists may be a campaign aid, any union that has been on a property as long as IBT represented some employees of REA Express, should have sufficient familiarity with that property to conduct an effective campaign. In the present case, the IBT obviously was able to conduct such a campaign since it secured the support of more than three times its membership.

The underlying assumption of the IBT claim is that if given more time it might have changed the election

results. This claim is not only pure speculation, but is contrary to political experience. Such experience indicates that a 64% vote for one candidate cannot be changed to a majority for another by additional campaigning. Such additional campaigning could just as easily have increased the BRC majority. A contrary claim hardly forms the basis to upset on constitutional grounds the Mediation Board's resolution of a serious representation dispute and return such dispute to its former chaotic status.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September, 1966

APPENDIX A

1965 SEP 24 PM 2 46
Telex—This message received direct from sender via W. U. Telex

WU TELEX WSH
IBOFTDC WSH

TLX PD WASHINGTON DC SEPTEMBER 24, 1965

JAMES L. HIGHSAW JR., ESQUIRE DO NOT PHONE
SUITE 620 TOWER BUILDING
WASHINGTON 5, D. C.

THE FOLLOWING WIRE SENT THIS DATE TO MR. THOMAS A. TRACY, EXECUTIVE SECRETARY, NATIONAL MEDIATION BOARD.

QUOTE—

RE: REA EXPRESS—CASE NO. R-3750

AT THE CONCLUSION OF THE INVESTIGATION IN THE ABOVE MATTER, ON SEPTEMBER 23, 19655, MEDIATOR WILLIAM PIERCE INFORMED THE UNDERSIGNED THAT AN ELECTION WOULD BE CONDUCTED BY THE BOARD WITHIN NO MORE THAN 45 DAYS AND POSSIBLY SOONER. IN LIGHT OF THE FOREGOING, ON BEHALF OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, THE UNDERSIGNER FORMALLY MOVES THAT THE BOARD NOT CONDUCT ITS ELECTION UNTIL AT LEAST 90 DAYS AFTER THE DATE ON WHICH THE PARTIES RECEIVE A LIST OF EMPLOYEE NAMES AND ADDRESSES FROM REA EXPRESS. THIS MOTION IS NECESSITATED BY THE FACT THAT THERE WILL BE APPROXIMATELY 40,000 ELIGIBLE VOTERS IN THE ELECTION AT APPROXIMATELY 8,000 COMPANY LOCATIONS AND THAT APPROXIMATELY 9,000 FURLOUGHED EMPLOYEES WILL BE PERMITTED TO VOTE. SINCE THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS NOW REPRESENTS ONLY APPROXIMATELY 3,500 OF THE COMPANY'S EMPLOYEES IN NINE LARGE CITIES, AND SINCE THE FOURTHCOMING ELECTION WILL TAKE PLACE THROUGHOUT THE UNITED STATES IN LARGE AND SMALL COMMUNITIES, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS MUST BE GIVEN A REASONABLE OPPORTUNITY TO COMMUNICATE WITH AND CAMPAIGN AMONG THE 37,000 ELIGIBLE VOTERS, WHICH IT DOES NOT NOW REPRESENT. FOR THE BOARD TO CONDUCT ONE OF THE LARGEST ELECTIONS EVER HELD, WITHOUT GIVING A PARTY A FULL AND AMPLE OPPORTUNITY TO PRESENT TO THE ELIGIBLE VOTERS THE REASONS FOR CASTING A BALLOT IN ITS FAVOR, WOULD DEPRIVE THE PARTY OF ITS CONSTITUTIONAL AND STATUTORY RIGHTS AND WOULD DEPRIVE THE ELIGIBLE EMPLOYEES OF

THEIR RIGHT TO HEAR THE CONTESTANTS AND MAKE A REASONED CHOICE IN THE ELECTION.

IN LIGHT OF THE FOREGOING, THE UNDERSIGNED RESPECTFULLY REQUESTS THAT ITS MOTION BE GRANTED. THIS REQUEST IS MADE, OF COURSE, WITHOUT PREJUDICE TO ANY POSITION HERETOFORE TAKEN IN THIS CASE BY THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS.

AN EARLY DECISION WILL BE GREATLY APPRECIATED.
UNQUOTE.

HERBERT S. THATCHER

WU TELEX WSH
IBOFTDC WSH